is expressly excluded from the general reception of English common law and rules of equity as part of the law of Malaysia. See *T. Damodaran v. Choe Kuan Him* [1979] 2 MLJ 267 at p. 270.

*Than Kok Leong* went on appeal to the then Federal Court which heard the appeal on 23 September 1982 and dismissed it with costs.

Therefore, the particular condition of sale in the present case that the property was "... sold subject to all assets, liabilities and rights (if any) subsisting thereon ..." must mean, to paraphrase the Supreme Court in the *Hotel Ambassador* context, *inter alia* only rights to tenancies protected by the Code.

In the circumstances, I proceeded to make an order in terms of the originating summons herein that the defendants deliver vacant possession of the property in question, not forthwith as claimed, but at the expiry of three months from the date of the order and awarded costs against the defendants. I also ordered that damages be assessed by the Registrar on a date to be fixed.

Learned Counsel for the defendants then applied orally for adjournment of the matter into Court for further argument under O. 56, r. 2(2) (repealed with effect from 1 August 1993). I declined to hear them further as the matter had been fully canvassed before me in chambers.

This was followed by an application for a stay of my order in terms of the originating summons pending an appeal to the Supreme Court. This was refused as there were no special circumstances which justified a stay and further, in my view, the issue had been determined by the Supreme Court in *Hotel Ambassador* after full consideration of the relevant provisions of the Code. That decision is binding on me.

**PUSHPADEVI SINGAM**

**v.**

**UNIVERSITY OF MALAYA**

HIGH COURT, KUALA LUMPUR
DATO' LIM BENG CHOON J.
[CIVIL SUIT NO. P 449 OF 1984]
25 AUGUST 1993

***EMPLOYMENT LAW: Terms and conditions of employment - Entitlement to sick leave - Applicable statutes and regulations - Whether plaintiff had exceeded her entitlement - Plaintiff boarded out on medical grounds - Whether plaintiff's dismissal valid and proper.***

***ADMINISTRATIVE LAW: Defendant convening Medical Board to investigate into general health of plaintiff - Medical Board recommending that plaintiff be medically boarded out - Role of Court in exercising power of judicial review over proceedings carried out by Medical Board - Whether Medical Board had committed error of law in reaching its decision - Whether Medical Board had taken into consideration irrelevant matters in reaching its decision - Whether Medical Board's recommendations defective in law - Whether plaintiff's termination of service void ab initio.***

The plaintiff was employed as a telephone operator by the defendant University. Shortly after the plaintiff's appointment the defendant enacted the University of Malaya Medical Service Scheme Regulations (the UMMSS Regulations) under which the plaintiff was entitled to sick leave of 90 days in any calendar year with the grant of any further sick leave being at the discretion of the University Council.

Upon the formulation of the Skim Gaji Harun, the defendant passed Service Circular UM01 of 1975 which provided that an employees' eligibility for medical leave would be for a period of 90 days in the first instance subject to a maximum of 180 days in a year or at any one time. The plaintiff opted to accept the Harun Scheme as set out in UM01 of 1975.

In 1978 the plaintiff had taken 93 days medical leave and the defendant convened a Medical Board under Rule 10 of the UMMSS Regulations to consider whether the plaintiff, by reason of her health, was fit to carry on her duties. The Medical Board at its first meeting came to the conclusion that the plaintiff was physically fit to work but suggested that she should be referred to a psychiatrist for an examination

of her psyco-social problems which might interfere with her work and that the matter be reviewed after receipt of the psychiatrist report. The Consultant Psychiatrist of the defendant University disagreed with the Medical Board's view and refused to accept the plaintiff as a psychiatric patient.

At the second Medical Board meeting, the Board held that the plaintiff's health condition was chronic and recommended that the plaintiff's services be terminated for health reasons. The defendant accepted the Board's recommendation and advised the plaintiff that she was to be medically boarded out.

The plaintiff applied for declarations that the termination of her employment is null and void and of no effect and that she continues to be in the service of the defendant.

**Held:**

**[1]** Notwithstanding that the UMMSS Regulations, Rules 6 & 8 had not at the material time been repealed, cancelled or amended, the two said rules could not apply to the plaintiff after she had opted to come under the terms of UM01 of 1975. Therefore the plaintiff's eligibility for medical leave was goverened by UM01 of 1975 which provided that she was entitled to a period of 90 days in the first instance subject to a maximum of 180 days in a year or at any one time.

**[2]** In praying for the declaratory orders the plaintiff was asking the Court to exercise its power of judicial review over the proceedings carried out by the Medical Board. In exercising its powers of judicial review, the Court must bear in mind the important distinction between matters of law and matters of fact because while the Court is more inclined to review an error of law committed by the inferior tribunal it is less inclined to review errors of facts.

**[3]** The element which moved the Medical Board to arrive at their conclusion that the plaintiff was sufferring from a "chronic ailment" was not the state of health of the plaintiff but rather the number of days of medical leave taken by the plaintiff for the year 1975 up to the year 1979 and the statements made by the Dean of the Faculty of Engineering, which statements were entirely unrelated to the state of health of the plaintiff.

**[4]** While the Medical Board had the right to take into consideration the history of the medical leave taken by the plaintiff, they could not base their conclusion solely on this factor and ignore other evidence which was favourable to the case of the plaintiff. The Board was not set up as a disciplinary body to deliberate on the conduct and behaviour of the plaintiff but rather to look into the question as to whether the plaintiff was medically fit to continue with her performance as a telephone operator.

**[5]** In the circumstances of this case there was no justification for the Medical Board to hold a view favourable to the plaintiff at their first meeting and yet to reverse their view at the second meeting and reach an entirely different conclusion when the documentary evidence tendered at both meetings were the same.

**[6]** In the event the termination of the services of the plaintiff by the defendant's Council by medically boarding her out was wrong since it was made as a result of the Medical Board's recommendations which were defective in law. As a result the termination of the plaintiff's services by the defendant is *void ab initio*.

**[7]** By UM01 of 1975 the defendant University had made an offer to the plaintiff regarding the new terms and conditions of service which the latter had unequivocably accepted. The defendant is therefore contractually bound to comply with their obligations arising from the new terms and conditions as set out in UM01 of 1975. The obligations must necessarily include their acceptance of the statutory status of the plaintiff as their employee.

**[8]** In an ordinary case of master and servant, the only relief available to a plaintiff for wrongful termination of employment is a claim for damages. However, in the present case as the plaintiff has acquired a status protected by statute, the ordinary master and servant rule is of no application. As the termination of the plaintiff's services on medical grounds was wrongful, in law the plaintiff's employment had never been terminated and the plaintiff's contract of employment continues to be operative until the defendant chooses to terminate it in a lawful manner.

*[Plaintiff's termination declared to be null and void and of no effect. Plaintiff not granted declaration that she continues to be in service as she has reached the compulsary retirement age. Defendant directed to pay all sums due and receivable by the plaintiff between 10 November*

*1979 up to the date when she attained the compulsory retirement age. Defendant to pay the costs of the proceedings].*

**Cases referred to:**
*Pahlhofer v. Hillington London Borough Council [1986] AC 484 @ 518* ***(refd)***
*R v. Crown Court of Knightbridge ex p. Quinlan [1988] Times 13th December* ***(refd)***
*Anismic Ltd. v. Foreign Compensation Commission and Anor. [1969] 2 AC 147* ***(refd)***
*Rex v. Nat Bell Liquors Ltd. [1922] 2 AC 128 @ 156* ***(refd)***
*Francis v. Muncipal Councillors of Kuala Lumpur [1962] MLJ 407* ***(dist)***
*Vine and National Dock Labour Board [1956] 1 QB 658* ***(refd)***
*Fadzil bin Mohamed Noor v. UTM [1981] CLJ 85 / [1981] 2 MLJ 196* ***(foll)***

**Legislation referred to:**
University of Malaya Medical Service Scheme Regulations 1964, rr. 6, 8, 10
Universities and University Colleges Act 1971, ss. 7(1) (2), 8

**Other sources referred to:**
**Constitutional and Administrative Law,** de Smith, 5th Edn., p. 580
**Halsbury's Laws of England**, 4th Edn., Vol. 1, p. 92

*For the plaintiff - L. Sabapathy (Joseph Yeo with him); M/s. Sri Ram & Co.*
*For the defendant - M. Nagarajah; M/s. Shook Lin & Bok*

**JUDGMENT**

**Lim Beng Choon J:**
In this action the plaintiff is asking for two declaratory orders *viz:*

(i) a declaration that the termination of the plaintiff's employment by the defendant is null and void and of no effect; and
(ii) a declaration that the plaintiff continues to be in the service of the defendant.

As a consequence thereof the plaintiff is also asking for two incidental orders namely:

(i) an order directing the defendant to reinstate the plaintiff to her original appointment with the defendant with no loss of benefits; and
(ii) an order requiring the defendant to pay the plaintiff all sums receivable by the plaintiff between 10 November 1979 to date of her reinstatement.

On the first day of the trial that is on 23 August 1990 Counsel for the plaintiff produced and tendered the following bundle of documents.

(a) Amended bundle of pleadings which the Court marked as "AB".
(b) Plaintiff's bundle of documents marked by the Court as "A".
(c) Defendant's bundle of documents marked by the Court as "B".
(d) Defendant's further bundle of documents marked by the Court as "C" and
(e) Defendant's further bundle of documents Vol. 2 marked by the Court as "D".

At the trial the first witness, the plaintiff herself in the course of her giving evidence in the examination in chief produced two medical reports compiled by the Medical Board of the University of Malaya ("the Medical Board") dated 25 April 1979 and 21 June 1979 and these two reports appearing in pp. 23 to 24 and pp. 25 to 26 of Bundle "B" were tendered and marked as exhibits P1 and P2 respectively. At the commencement of the continued trial of the case on 28 October 1992 Counsel for the plaintiff indicated to me that the plaintiff would not agree to the contents of P1 and P2. I was rather amazed at such a suggestion considering that it was the plaintiff herself who tendered the said two medical reports which were marked as plaintiff's exhibits P1 and P2. I therefore questioned the learned Counsel regarding the plaintiff's right to resile from agreeing to the contents of P1 and P2 which, to my mind, would amount to asking the Court to ignore the contents of the two exhibits when they had already been accepted as evidence to support the plaintiff's case. The learned Counsel offered an explanation to me which can be paraphrased thus: The important issue raised by the plaintiff in her amended statement of claim as well as her evidence given at first day of the trial involved *inter alia* the question whether the decision of the Medical Board to terminate the employment of the plaintiff on medical grounds as conveyed in P1 and P2 could be sustained. It is therefore inevitable that the plaintiff could not agree to the contents of P1 and P2. To my mind the explanation of learned Counsel amounts to nothing more than carelessness on the part of Counsels. As such the plaintiff should not be penalised for her Counsel's mistake. More importantly the question of the admissibility of the two medical reports as evidence is to my mind rather

doubtful. In any event Counsel for the defendant did not raise any serious objection to the proposal of the plaintiff. That being the case, I therefore directed that the tendering of P1 and P2 as exhibits was only for the purpose of obviating the necessity to call the makers thereof but the contents of the same were disputed by the plaintiff. All parties agreed to the aforementioned directions. All parties also agreed that all documents in the four bundles 'A', 'B', 'C' and 'D' could be admitted as evidence except pp. 6 to 10 and p. 27 of Bundle A which should be discarded as they were not relevant to the case. Again pp 1 to 20 of Bundle B should likewise be discarded for the same reason. The said four Bundle of Documents are duly tendered as exhibits A, B, C and D respectively except for the aforementioned pages which both parties agreed that they be discarded.

The plaintiff was appointed as a telephone operator of the defendant University by a letter of appointment dated 28 April 1964 (see p. 1 of Bundle A). A leaflet containing the terms and conditions of service was annexed in the letter of appointment. The terms and conditions relevant to the present case are as follows:

1. Under condition (5) it was stated that after confirmation of the defendant as telephone operator neither the University nor the plaintiff herself could terminate the employment without adequate notice, which should not be less than one calender month;
2. Under condition (7) it was provided that the plaintiff would be eligible for sick leave in accordance with Rules approved by the Council of the defendant University and applicable to her;
3. Condition (8) provided that the plaintiff was eligible for vacation leave at the rate of twenty-one days for each completed year of service which if permitted by the Head of Department concerned, could be accumulated for two years;
4. Condition (9) said that the contract of employment would terminate when the plaintiff reached the age of 55 years.

There were 9 other terms and conditions set out in the leaflet but except for condition 1 and condition 4 which will be referred to presently the remaining conditions are not, my mind, relevant to this case and there is therefore no necessity to set them out in this judgment.

The plaintiff accepted the appointment on the terms and conditions as specified in leaflet annexed to the letter of appointment. At the time of appointment it was mentioned in condition 1 of the terms and conditions that her initial salary would be RM137.50 per mensem pursuant to the specified salary scale of RM137.50 x 7.50 - 197.50/ x 7.50 - 235. However condition 4 specified that when she arrived at any bar on the salary scale as mentioned in condition 1, promotion over the bar would not be automatic but would be at the absolute discretion and decision of the Council of the defendant University. The said Council will hereinafter be referred to as "the University Council". Shortly after the plaintiff's appointment as a telephone operator, the defendant University enacted the University of Malaya Medical Service Scheme Regulations ("The UMMSS Regulations"). Under the heading of Sick Leave Rules in the UMMSS Regulations 1964 it is provided in Rule 6 that "Sick leave up to a total of 90 days in any calendar year may be granted to the Vice-Chancellor by the Council, and to any other member of the staff by the Vice-Chancellor". Further sick leave may be granted exceeding 90 days provided that the grant of such further leave on full pay "shall be at the discretion of the Council who may grant additional sick leave for such period or periods on full salary, half salary or no salary or partly on one or partly on the other or others as the Council may decide according to the circumstances of each case. Rule 10 thereof provides for the convening of a Medical Board in the circumstances as set out therein. As the issues raised in the present case are to a certain extent connected with the two reports of the Medical Board convened to investigate into the general health of the plaintiff, it is appropriate that the said Rule 10 be set out in full. The said rule reads:

10. A medical board may be convened when:
    (a) a member of staff is certified unfit after his normal sick leave entitlement has been exhausted;
    (b) an approved Medical Practitioner forms the opinion that there is no prospect of a member of staff becoming fit for duty;
    (c) in each of three successive years a member of staff has been absent on sick leave for a total of 45 days or more;
    (d) the mental or physical fitness of a member of staff is in doubt;
    (e) a member of staff has been injured in the course of duty if the period of incapacity exceeds 90 days;
    (f) a member of staff is certified to be suffering from tuberculosis or leprosy

if the period of incapacity exceeds 90 days.

The report of the Medical Board is required by Rule 12 thereof to be rendered in the first instance to the Vice-Chancellor who shall be responsible for such further action as may be necessary in the light of the report.

Upon the formulation of the Skim Gaji Harun ("Harun Scheme") which dealt with service matters relating to the employment of staff members of local and statutory bodies, the defendant University adopted the Harun's recommendations as contained in the Harun's Scheme in so far as they could be applicable to the administrating of a university. The defendant University therefore passed Service Circular UMOI of 1975 and paragraph 56 thereof sets out the terms of an employee's eligibility for medical leave and the relevant part of the passage reads as follows:

> Employees shall be eligible for medical leave as follows subject to certification by a Medical Practitioner or an approved Panel of Doctors:
>
> (a) Medical leave for normal illness for a period of 90 days in the fist instance subject to a maximum of 180 days in a year or at any one time; ...

Following the passing of this Service Circular UMOI of 1975 the plaintiff opted to accept the Harun's Scheme subject to the terms and conditions as set out in Service Circular UMOI of 1975 (see pp. 1 and 2 of Bundle D).

Apparently as a result of the publication of the Harun's Scheme a footnote was added to the UMMSS Regulations - Sick Rules of 1964 and the footnote reads:

> (a) These Rules are in the course of revision as a result of the New Salaries and Terms of Service (Harun Scheme). Meanwhile the application of these Rules to employees who have opted for or are governed by the Harun Scheme, shall be subject to the relevant provisions of Service Circular 01 of 1975

In 1977 the defendant University passed Service Circular UM1 of 1977 to adopt the recommendations made pursuant to the Cabinet Committee Salary Scheme 1977. This Service Circular dealt primarily with the implementation of the new salary scales recommended by said Scheme. The said 1977 Service Circular also contains *inter alia* the following provisions relating to the pensioning of employees:

> 7.18. Pencen ganjaran dan lain-lain faedah persaraan tidak akan dikurniakan kepada seseorang pekerja sehingga ia bersara dalam keadaan-keadaan berikut:
>
> (a) not applicable;
> (b) not applicable;
> (c) atas bukti-bukti perubatan yang dapat diterima oleh pihak berkuasa tertentu bahawa pekerjaan berkenaan tidak lagi berkeupayaan untuk meneruskan tugasnya disebabkan oleh kecacatan fikiran atau anggotanya yang dijangkakan berkekalan.

An offer was made to the plaintiff to opt into the Cabinet Committee Scheme and she duly did so (see p. 3 of Bundle D).

In July 1978 the plaintiff underwent an operation in respect of the treatment of hernia and she took medical leave from 19 July 1978 till 30 August 1978. Again in October 1978 she underwent another operation for her prolapse uterus. In respect of this second operation she took medical leave from 10 October 1978 till 11 November 1978. In that year she admitted that she took a total of 93 days leave. The defendant University was apparently unhappy about the prolonged leave taken by the plaintiff and the University Council set up a Working Committee to look into the matter. This Committee decided to convene a Medical Board pursuant to UMMSS Regulation - Sick Leave Rules, Rule 10. As a result, the Deputy Registrar of the University was directed to and he did write a letter dated 7 December 1978 (see p. 13 of Bundle 'A') to the plaintiff informing her that the working committee of the University had noted that the plaintiff had taken 93 days medical leave in 1978 which was in excess of the 90 days allowed for an employee as provided in the Medical Service Scheme and the said Committee had therefore agreed that a Medical Board be convened to consider whether, by reason of her health, the plaintiff was fit to carry on her duties. The Medical Board held its first meeting on 25 April 1979 and it was chaired by Professor P. Subramaniam a surgeon attached to the Jabatan Orthopedic Surgeri together with 2 other professors from the Jabatan Obstetiks and Ginelokogi and Jabatan Perubatan respectively. The plaintiff attended the meeting. At the conclusion of the meeting the Medical Board wrote a Report (see p. 23 of Bundle B) in which

the Board set out the events that took place at the meeting and observed that -

(i) a medical board had been convened a few times to investigate the health condition of the plaintiff. This happened on 19 December 1971, 9 October 1972 and 23 April 1973;

(ii) the plaintiff had undergone three operations involving -

(a) the removal of her gall bladder and appendix in 1971;
(b) treatment of a hernia problem in September 1978
(c) treatment of prolapse uterus in October 1978.

(iii) the number of days of medical leave taken by the plaintiff exceeded the usual days of medical leave to which she was eligible;

(iv) at the moment she appeared to be fit to carry on her duties as a telephone operator. However the Medical Board was of the view that the plaintiff had psycho-social problems.

As a result the said Board came to the conclusion that the plaintiff was physically fit to work. However the Board also suggested that the plaintiff should be referred to a psychiatrist for an examination of her suspected psycho social problems which might interfere with her work. The Board then suggested that the plaintiff's case be reviewed within three months after it had received a report from the psychiatrist. The Medical Board re-convened on 21 June 1979 to review the plaintiff's case. It was again chaired by Professor P. Balasubramaniam Ketua Jabatan Orthopedik with 2 others. In addition one Puan Nik Rosnah the Pegawai Tadbir Bahagian Perjawatan, was also present as well as Dr. Tengku Mohd. Azzman Shariffudeen the Dean of the Faculty of Engineering who was invited to attend the Board's meeting. The plaintiff was also present and at the close of the meeting the Board put up a written report (see pp. 75 and 76 of Bundle "B"). It appears from the said report that at the meeting the Dean of the Faculty of Engineering informed the Board that apart from taking medical leave, the plaintiff also often took emergency leave. Furthermore even whilst working the plaintiff would sometimes leave her desk without giving any reason. The said Dean then informed the Medical Board that it was very important for the Faculty of Engineering to have a methodical telephone communication and the fact that the plaintiff often took leave created problems for the said Faculty to communicate with the outside world.

This problem arose since mid 1976 when the plaintiff was transferred to the said Faculty. The said Board thereafter interviewed the plaintiff. On completion of the review the said Board took into consideration all the evidence and was satisfied that the health condition of the plaintiff was chronic. The Board unanimously agreed to convey to the Vice chancellor that:

> Memandangkan rekod-rekod Puan T.P. Singam di University, Perkhidmatan beliau ditamatkan atas sebab-sebab kesihatan (be medically boarded out) mulai pada suatu tarikh yang ditetapkan oleh Naib-Canselor.

Apparently the matter was subsequently referred by the Vice-Chancellor to the University Council and at the meeting of the said Council held on 9 August 1979, it was agreed to accept the recommendation of the Medical Board to terminate the service of the plaintiff for health reasons and to medically board her out. This decision of the said Council was duly conveyed to the plaintiff by letter dated 10 August 1979 (see p. 23 of Bundle "A"). The plaintiff was also informed by that letter that she was given 3 months' notice with effect from 10 August 1979 to terminate her service for health reasons and the last date of her service with the defendant University was 9 November 1979. She would be receiving the relevant forms in due course for her to complete for purpose of pension. On receipt of the University Council's letter the plaintiff wrote to them on 14 August 1979 stating that she intended to lodge an appeal to the said Council and requested that the matter of her pension be held in abeyance pending the appeal to which the Deputy Registrar of the University replied indicating that under the circumstances the University could not be held responsible for any delay in payment of pension to the plaintiff if and when she was entitled to receive the same. On 4 September the plaintiff sent a three-page appeal to the Vice-Chancellor in which she raised *inter alia* that:

(a) She based her appeal on the fact that she was now no longer suffering from any ailment that could interfere with her carrying out her work satisfactorily as a telephone operator with the University;
(b) in addition she also indicated that if necessary the Council could refer her to a doctor to examine her condition in order to ascertain whether she was in good health;

The plaintiff received a reply from the Deputy Registrar of the University stating that the

University Council had at the meeting of the Council held on 13 September 1979 rejected her appeal and this was followed by another letter from the Deputy Registrar on 21 September 1979 to remind her to complete the necessary papers for pension. The plaintiff refused to take the necessary action as suggested by the Deputy Registrar and persisted in asking that the matter be postponed pending her appeal against the termination of her service. As she could not get anywhere with the said Council, the plaintiff therefore wrote a letter dated 8 October 1979 (see p. 37 of Bundle "A") to the Ministry of Labour and Manpower. She also enlisted the aid of the General Secretary of the University of Malaya General Staff Union to resolve the matter for her. In spite of all the actions taken by her, nothing came out of it. Hence the filing of this suit against the defendant.

PW1, the plaintiff in her evidence said that at the first meeting of the Medical Board held on 25 April 1979 the members of the Board merely asked her regarding her health considering that she had undergone two operations. Her reply to the Board was that she was healthy and fit in performing her duty as a telephone operator. Thereafter the members of the Board did not say anything except to tell her to go home. At the second Medical Board meeting, which according to her, was held some two weeks later she was asked the same question and in addition they asked her the reason for taking vacation leave. She told the Board that she took the leave in order to take care of her husband who was admitted into a hospital for coronary treatment. The members of the Board did not pursue the matter and again told her to go home. She also said in evidence that when she wrote to the defendant University on 20 April 1982 (see p. 57 of Bundle A) to enquire whether her salary scheme and service conditions were regulated by the provisions set out in Service Circular UM01 of 1975 the reply she received was in the affirmative (see p. 58 of Bundle 'A'). Thereafter she wrote a few letters of appeal to the defendant University stating that under Service Circular UM01 of 1975 she was entitled to 180 days medical leave and she had at the material time taken 93 days medical leave only. All her appeals were rejected. Under cross-examination she agreed that had she continued with the service as telephone operator with the defendant University she would have to retire on 24 June 1992 as she would by then have reached the age of 55 years. She also agreed that her past medical records were obtained by the University with her consent and these records were referred to by the Medical Board at the two meetings held by the said Board to enquire into her case. To the suggestion of Counsel for the defendant that under clause 37 of Service Circular UM01 of 1975 either party could terminate the service of the plaintiff by giving 3 month's notice, she said she had no knowledge of such provision. She further admitted that after ceasing to work for the defendant University she had not been gainfully employed by anyone. Indeed she did not attempt to find employment because she was of the view that after the case the defendant University would call her back to work for them. Finally she said in evidence that at the Medical Board's meetings she did give evidence but she had not called any witnesses neither did she make a request to call any witnesses. In re-examination she said that the Medical Board did not inform her that she could call witnesses and had they done so she would have called the doctors who operated on her and who treated her to testify on her behalf.

The defendant University called their Assistant Registrar to testify as DW1. He was and still is in charge of service matters of the staff of the defendant University as from 9 January 1981 but apparently he has knowledge of the plaintiff's case only from her records kept by the service section of the defendant University. He testified that as the plaintiff opted to accept the service conditions and salary scales under Service Circular UM01 of 1975 and Service Circular UM 1 of 1977, the plaintiff was, at the time of the termination of her service, governed by (i) the UMMSS Regulations 1964, Service Circular UM 01 of 1975 and Service Circular UM 1 of 1977. When reference was made to Bundle C pp 10 -12 by Counsel for the defendant DW1 said that they were records of the number of days of medical leave taken by the defendant from the years 1964 up to the middle of the year 1979. He agreed in examination - in - chief that the plaintiff was eligible or entitled to 90 days medical leave up to a maximum of 180 days. But when he was referred to Rule 8 of the UMMSS Regulations - Sick Leave Rule - he said that according to that Rule a staff member was eligible up to 90 days medical leave. Any period exceeding that had to have the approval of the University Council who could decide to grant further leave on full pay, half pay or no pay at all.

Under cross-examination he disagreed that after the passing of Service Circular UM01 of 1975 the University Medical Service Scheme was no longer applicable. DW1 went on to clarify the salary scale of the plaintiff after she had been medically boarded out. There had been three revisions and the final one was in 1986 which was and still is 335 - 15 - 365/380 x 15-500 x 20 to 520 x 25 to 570/620 x 25 = 720 and DW1 said that had the plaintiff continued in service she would have received RM720 p.m. In re-examination DW1 reiterated that the UMMSS Regulations 1964 - Sick Leave Rules still exist today. By Rule 8 thereof the University Council would deal with the mechanics of granting more than 90 days medical leave.

The next witness called by the defendant University was one Datuk Dr. T.A. Sinnathuray, DW2, who was a Professor of Obstetrics and Gynecologist of the defendant University at the material time and also Head of Department of Gynecologist. In his evidence he said that he was appointed as a member of the Medical Board convened on 25 April 1979 to enquire into whether the plaintiff was medically fit to work. He confirmed that the defendant University had set up a Medical Board on 5 occasions and the one convened on 25 April 1979 was the 6th Medical Board meeting. All the 6 Medical Board meetings were held to inquire into the health condition of the same person *viz* the plaintiff. DW2 was present at all the 6 meetings. At the 6th meeting the said Board was provided with:

(a) Personal particulars of the plaintiff and the background history of her case;
(b) Medical Report from Datuk (Dr.) R Menon Specialist Consultant on Obstetrics and Gynecologist attached to Assunta Hospital dated 2 September 1978 and 7 November 1978 and;
(c) Particulars of medical leave taken by the plaintiff for the year 1978.

The plaintiff was interviewed before the said Board arrived at a conclusion as set out in paragraph 6 (a), (b) and (c) in their April 1979 Medical Report which I have set out in full earlier. DW2 then went on to say in his evidence that the outcome of the meeting was that the said Board was of the view that the case of the plaintiff needed to be re-evaluated because it was felt that the major problem of the plaintiff was of a psycho-social nature although the plaintiff was physically fit. She was cured of her ailment but she had a psychological problem. Therefore DW2 recommended that the Board should get a psychological opinion before the re-evaluation of the plaintiff's case. DW2 went on to testify that when the said Board met the second time on 21st June 1979 to continue to look into the plaintiff's case the Chairman, one Professor Balasubramaniam, informed the members that he had consulted with the Consultant Psychiatrist of the defendant University. From the consultation, Professor Balasubramaniam apparently was of the view that the psycho-social aspects of the plaintiff's condition were related to the plaintiff's various organic ailments. All the members of the said Board therefore agreed that the plaintiff's case was not a pure psychiatric problem. The said Board was competent to make a decision based on the entire medical reports submitted to it which went as far back as 1968. The said Board also interviewed the Dean of the faculty of engineering under whom the plaintiff was directly employed. The plaintiff was also interviewed again at this second meeting of the said Board. Before the said Board came to a conclusion it reviewed all the medical records and previous reports of the said Board since 1972 to 1979. The said Board thereafter recommended that the plaintiff should be medically boarded out. Under cross-examination DW2 testified *inter alia* that the said Board had with it the medical report written by the doctor who operated on the plaintiff as well as another medical report written by the doctor who treated her. According to the latter report the plaintiff was said to be fit to serve the defendant University. The said Board took into consideration all the evidence as stated in the said Board's Report made as a result of the 25th April meeting. Based on the two medical reports written by the plaintiff's doctors the Board was of the view that the plaintiff was fit to work. However the Board had some reservation as to the psycho-social aspects of the plaintiff's case; hence the recommendation to re-evaluate her case in 3 months' time. At the second meeting no psychiatrist's report was furnished as the plaintiff was never examined by the psychiatrist who was of the view that a report from him was not necessary. At the second meeting DW2 said that the Board was given the same documents as were given to it at the earlier April meeting. But at the June meeting the Dean of the faculty of engineering was present and he made certain observations about the plaintiff which I shall deal with presently. DW2 wound up his evidence under

cross-examination by saying that he "was not aware of any changes in the plaintiff from April 1979 to June 1979" and that "we made the recommendation (to medically board her out) on the basis of the medical reports." In re-examination DW2 said that the Board was entitled to look into the past medical reports of the plaintiff as well as her ailment. When asked what made the Board to change their mind, DW2 replied in the following words:

> I would regard the 2 board meetings as one continuous exercise. At the earlier meeting we felt the plaintiff was physically fit to work but there appeared to be a psycho social aspect of the case which we had to look into. The conclusion we arrived at the first meeting was a preliminary one. Our findings were stated in paragraph 5 of the Report (of the first meeting).

To resolve this case the first issue to consider is the number of days of medical leave for which the plaintiff was eligible under the various statutory rules and service circulars. Under the University of Malaya Medical Services Scheme ("UMMSS") Sick Leave Rule 6, she was eligible for a total of 90 days. That rule is not absolute as the Council may grant additional medical leave exceeding 90 days on full pay, half pay or no pay as the Council may decide according to the circumstances (see Rule 8). These 2 rules were modified under Service Circular UM01 of 1975. Paragraph 56(a) provided for medical leave to 90 days in the first instance subject to a maximum of 180 days. It is further stated in paragraphs 177 and 178 thereof that the rules and regulations governing the terms and conditions of service shall cease to be applicable to those employees who opt to accept the new salary scheme inclusive of the terms and conditions of service as set out in the said Circular and steps are being taken to repeal, cancel or amend the relevant laws, circular, orders and instructions, as the case may be, to bring them in conformity with the terms of Service Circular UM01 of 1975. It is therefore clear that notwithstanding that UMMSS Rules 6 and 8 had not, at the material time, been repealed cancelled or amended, the two said rules could not apply to the plaintiff after she had opted under Service Circular UM01 of 1975. Her eligibility for medical leave was governed by the said Circular and not under Rules 6 and 8 of UMMSS. In this connection it is to be noted that the defendant University wrote to the plaintiff on 7 December 1978 stating that the Council had taken note of the fact that the plaintiff had taken medical leave totalling 93 days from January to November 1978 which was in excess of the 90 days' medical leave per annum provided for the staff member of the defendant University under the UMMSS. The statement is not correct since the plaintiff had by then opted into the scheme of service set out in the said Circular UM01 of 1975 which had modified the medical leave provisions set out in the UMMSS as stated above.

The second issue relates to the findings of the Medical Board. Counsel for the plaintiff submitted intensively that the Board's findings were totally erroneous on several grounds. I shall deal with this submission presently. Although the Medical Board held two meetings I have no doubt that the second meeting held on 21 June 1979 was a continuation of the first meeting held on 25 April 1979. This proposition is supported by the fact that at the close of the first meeting it was noted down in the Board's report of that meeting (see P1) that the case of the plaintiff was to be further investigated within 3 months after obtaining the report from the Consultant Psychologist. DW2 who was a member of the Board and who attended both the meetings confirmed this proposition when he said in his evidence:

> I would regard the 2 Board meetings as one continuous exercise.

Now it is important to bear in mind that the reason for the Council to convene the Medical Board under Regulation 10 of the UMMSS Regulations 1964 was to inquire whether by reason of the plaintiff's health condition, she was physically fit to continue with her employment with the defendant University as a telephone operator. The circumstances in which a Medical Board may be convened have been set out in full earlier. There is no need for me to repeat them here. Suffice it to state that the Working Committee was entitled to convene such a Medical Board under the said Regulation 10.

The Medical Board held their first meeting on 25 April 1979 as stated earlier and they put up a Report ('P1') in respect of the meeting. I have stated briefly the contents of P1 which must be read in the light of the evidence adduced at the trial. In doing so it is shown that at that meeting the Medical Board was furnished with a document setting out the personal particulars of

the plaintiff and the background of her case. Two medical reports supplied by Dr. R. Menon, the Specialist Consultant on obstetrics and gynecology from the Assunta Hospital as well as a document setting out the total medical leave taken by the plaintiff for the year 1978 were also furnished to the said Board. From my reading of P1 I have no doubt that the Medical Board had found as a fact that the plaintiff was physically fit to work and that she was cured of her ailment. The only reservation they had upon the conclusion of the first meeting was that there was a possibility that the plaintiff might be suffering from a psychological-social problem. Bearing in mind that under Regulation 10 of the UMMSS Regulation 1964 the Medical Board was required not only to enquire into the physical fitness, of a member staff but also his or her mental fitness, I cannot justifiably hold that the Medical Board should recommend to the Council at the close of the first meeting that the plaintiff was medically fit to work. To fortify my proposition it is to be noted that even in Dr. Menon's letter of 7 November 1978 which is rather non-committal as to whether the plaintiff was fit to work - he merely said that after her medical leave the plaintiff "should" be fit to commence work (see p. 16 of Bundle 'A').

The Medical Board's second meeting held on 21st June 1979 also led to the compilation of a Report 'P2' which again must be read in the light of the evidence adduced at the trial. In so doing it is shown that that at second meeting the Medical Board took into account the record of the medical leave taken by the plaintiff from the year 1975 till June 1979. They also took into account the statements made by the Dean of the Faculty of Engineering about the plaintiff taking emergency leave and absenting herself from her post without permission in addition to her taking prolonged medical leave in 1978. Taking these two matters in consideration the Medical Board was of the view that the plaintiff was suffering from a chronic ailment, the nature of which was not stated in P2. However that may be the said Board also mentioned the one operation undergone by the plaintiff in 1971 and the 2 operations in 1978. In the ultimate analysis the said Board was of the view that after considering the past history of the ailments of the plaintiff and the multiple operations undergone by her as well as the many intermittent medical leave taken by the plaintiff they were of the view that the plaintiff was not fit for health reasons to continue to serve in any post with the defendant University. Hence they recommended that the plaintiff be medically boarded out as from a date to be determined by the Vice-Chancellor.

At this juncture it is appropriate to mention that I have made reference to the contents of P1 and P2. I think I am justified in doing so since the defendant University has called DW3, who was at the material time a member of the Medical Board and who attended the two meetings held by the Board. What is more important is that DW3 has in his evidence confirmed that the contents of P1 and P2 reflected the matters that were dealt with at the two meetings. I am however of the view that the question of whether the Medical Board has jurisdiction to deal with the matters mentioned in P1 and P2 is a separate matter which has to be considered. Likewise the question of the decision making process adopted by the Medical Board and the legality of their findings also have to be considered. Now it is to be noted that in praying for the declaratory orders mentioned earlier by the plaintiff, there is no doubt that this Court is being asked to exercise its power of judicial review over the proceedings carried out by the Medical Board. The nature and extent of judicial review in administrative law is succinctly expressed in **Halsbury's Laws of England,** 4th Edn., Vol. (1) at p. 92 where it has been said and I quote:

> Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is thus different from an ordinary appeal. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected: it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. Unless that restriction of the power of the court is observed, the Court will, under the guise of preventing the abuse of power, be itself guilty of usurping power. That is so whether or not there is a right of appeal against the decision on the merits. The duty of the court is to confine itself to the question of legality. Its concern is with whether a decision-making authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal could have reached or abused its powers. The grounds upon which administrative action is subject to control by judicial review have been

conveniently classified as threefold. The first ground is 'illegality': the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second is "irrationality', namely *Wednesbury* unreasonableness. The third is 'procedural impropriety'. What procedure will satisfy the public law requirement of procedural propriety depends upon the subject matter of the decision, the executive functions of the decision maker (if the decision is not that of an administrative tribunal) and the particular circumstances in which the decision came to be made. Even where facts are 'jurisdictional', the Court's investigation of them is of a supervisory character and not by way of appeal.

In exercising its power of judicial review, the Court must bear in mind the important distinction between matters of law and matters of fact because while the Court is more inclined to review an error of law committed by the inferior tribunal it is less inclined to review errors of facts - see for example *Pahlhofer v. Hilligton London Borough Council* [1986] AC 484 @ 518 and *R v. Crown Court of Knightbridge ex p. Quinlan* [1988] Times 13 December. However that may be it has been said in **de Smith Constitutional And Administrative Law,** 5th Edn., at p. 580 that and I quote:

> The superior Courts will afford redress for errors of fact in two main situations: first, in those rare circumstances where rights of appeal are not restricted to questions of law; and secondly, where a factual error causes a tribunal to step outside its jurisdiction. The courts will be somewhat reluctant to make an independent determination of a question of pure fact if the issue turns upon conflicting evidence and they have not heard the oral testimony themselves.

The most succinct expression of the scope of judicial review is stated by Lord Pearce in *Anismic Ltd. v. Foreign Compensation Commission and Anor.* [1969] 2 AC 147 at 195 where it is stated:

> The Courts have, however, always been careful to distinguish their intervention whether on excess of jurisdiction or error of law from an appellate function. Their jurisdiction over inferior tribunals is supervision not review.

It is to be noted in using the words "not review" Lord Pearce was in fact stating that the Court should not usurp the power of the tribunal conferred by law to enquire into the certain matters by taking upon itself to hold an enquiry in order to dissolve the matters when the law did not empower it to hold such an enquiry. Unless that restriction on the refraining of holding an enquiry by the Court is observed, the Court will, under the guise of preventing the abuse of power be itself usurping the power. Reverting to the speech of Lord Pearce in the *Anisminic* case His Lordship went on to quote the following passage from the judgment made in the case of *Rex v. Nat Bell Liquors Ltd.* [1922] 2 AC 128 @ 156:

> That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise.

Applying the above legal principles to the present case, I am satisfied that the Medical Board had committed an error of law in that it had arrived at a decision which no reasonable tribunal could have reached. The reasons for my saying so are as follows -

In the first place the Medical Board at their first meeting held on 25 April 1979 had found as a fact that the plaintiff was physically fit to work as she had been cured of her ailment. The only reason that deterred them from making a recommendation in favour of the plaintiff to the Council was that they suspected that the plaintiff might well have a psychological - social problem that needed to be referred to a psychiatrist. However when the matter was brought to the attention of Consultant Psychiatrist of the defendant University, he disagreed with the Medical Board's view and hence he refused to accept the plaintiff as a psychiatric patient. The Medical Board at their second meeting held on 21st June 1979 concurred with the said Consultant Psychiatrist's opinion. The said Board then proceeded with the enquiry into the plaintiff's case. In doing so they studied the same medical reports and the same documents which were tendered at the first meeting except that at the second meeting the Medical Board was supplied with a record of the medical leave taken by the plaintiff for the year 1975 (15 days), 1976 (26 days), 1977 (25 days) and 1978 (93 days) and for the first 7 months of 1979 (9 days). The Medical Board also took into consideration the statements made by the Dean of the faculty of engineering (which statements I have set out earlier and which were detrimental to the case of the plaintiff). The Medical Board thereupon had

an interview with the plaintiff and noted with concern the number of days of medical leave taken by the plaintiff from 1975 till 1979. Taking into consideration the number of days taken by the plaintiff since 1975 and the statement of the Dean of the Faculty of Engineering the Medical Board was of the view that the plaintiff was suffering from a "chronic ailment." The Medical Board then observed that from the history of the plaintiff's past ailments and the multiple operations undergone by her, it concluded that she was not fit to be employed by the defendant University in any post on medical grounds. Hence it recommended that she should be medically boarded out. Under the circumstances it is my considered opinion that the Board had taken into consideration matters which under the law, it had no right to do so.

In the second place, upon a careful examination of the evidence which was relied upon by the Medical Board to arrive at their conclusion as stated above, I am satisfied that the evidence does not and cannot support the Medical Board's conclusion that the plaintiff was suffering from "a chronic ailment" which led them to hold that the plaintiff should be medically boarded out of service. On the contrary the two medical reports furnished by Datuk (Dr.) R. Menon when read together lend support to the fact that the plaintiff was at the material time in good health and perfectly fit to carry on with her work (see particularly the said Dr. Menon's letter dated 22 December 1978). In the ultimate analysis I have no hesitation in holding that the element which moved the Medical Board to arrive at their conclusion was not the state of the health of the plaintiff but rather the number of days of medical leave taken by the plaintiff for the year 1975 up to the year 1979. In this connection it is to be noted that the Medical Board also took into account the statements made by the Dean of the Faculty of Engineering which were entirely unrelated to the health condition of the plaintiff. In so doing I must repeat that the Medical Board had undoubtedly taken into account matters which they had no right to do so. The said Board was not set up as a disciplinary body to deliberate on the conduct and behaviour of the plaintiff but rather to look into the question as to whether the plaintiff was medically fit to continue with her performance of the service as a telephone operator.

In arriving at the abovementioned conclusion I must at once say that there is no doubt that the Medical Board had the right to take into consideration the history of the medical leave taken by the plaintiff from 1975 to 1979 but to my mind they could not base their conclusion solely on this factor and ignore other evidence which is favourable to the case of the plaintiff. Finally there is in the circumstances of this case entirely no justification for the Medical Board to hold a view favourable to the plaintiff at their first meeting and yet at the second meeting they chose to reverse their earlier view and reach an entirely different conclusion when the documentary evidence tendered at both meetings were the same.

For the above reasons I hold that the termination of the service of the plaintiff by the Council in medically boarding her out is wrong since it was made as a result of the Medical Board's recommendations which were defective in law. The termination of the plaintiff's service is thus *void ab initio*.

Turning to the declaratory relief sought by the plaintiff who had been wrongfully dismissed or whose employment with a defendant had been wrongfully terminated, it must be born in mind that in an ordinary case of master and servant the only relief available to the plaintiff is a claim for damages and nothing more. The *locus classicus* is the case of *Francis v. Municipal Councillors of Kuala Lumpur* [1962] MLJ 407. The plaintiff, Francis, was employed by the defendant municipal council as a clerk. The council purported to dismiss him. Our then Court of Appeal in reversing the decision of the learned trial Judge, held that the dismissal was wrongful in that it was not made by the President of the Municipal Council who alone was competent to dismiss an employee of the said Council. As a result it was held that the plaintiff was entitled only to damages which were awarded on the basis of three months' salary. When the matter went before the Judicial Committee of the Privy Council, the decision of our then Court of Appeal was upheld and in so doing the Judicial Committee said at p. 410:

> In their Lordships' view when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general

> principle of law that the Courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the Court. In their Lordships' view there are no circumstances in the present case which would make it either just or proper to make such a declaration.

The above cited passage of the judgment of the Judicial Committee clearly implies that there may be circumstances in which a purported determination of a contract of service may not in law determine the contract. The "special circumstances" mentioned in the *Francis* case were illustrated in *Vine v. National Dock Labour Board* [1956] 1 QB 658. In that case "the special circumstances" was the statutory nature of the National Dock Labour Scheme which gave the plaintiff a statutory status over and above his rights under a contract of service of just an ordinary master and servant case and the plaintiff was granted a declaration that the removal of the plaintiff's name from the register of the National Board was in law a nullity and that he continued to have a right to be treated as a registered dock worker with all the benefits which by statute were conferred on him.

Bearing in mind the principles ennnuciated in the abovementioned two cases, it is useful first of all to examine the Universities and University Colleges Act 1971 ("Act 30") as well as the Constitution of the defendant University, the pertinent Statutes, Acts and Regulations enacted under the said Constitution before one can answer the question as regards to the status of the plaintiff as an employee of the defendant University.

The defendant University was incorporated under Act 30 of 1971 and it may pursuant to s. 7(1) thereof exercise all the powers conferred on it by Act 30 of 1971 or its Constitution. Subsection (2) of section 7 of the said Act however contains a proviso which says "unless otherwise expressly provided by this Act or the Constitution". This proviso clearly provides that the University authority can only act in pursuance to the powers given to it by law. It follows that if the law governing the defendant University confers upon the plaintiff a statutory status this is not a straight-forward case of master and servant in that they could not disturb the plaintiff's statutory status save in accordance with the said Act and/or the statutes or regulations made thereunder.

Under ss. 7 to 10 of its Constitution specific provisions are made for the appointment and removal of the Chancellor, Pro-Chancellor, Vice-Chancellor, Deputy Vice-Chancellor, a Registrar, a Bursar and a Librarian. The appointment and removal of these officers of the University is not very relevant to the present case and nothing much need to be stated about the appointment and removal of these officers. The more relevant section of the Constitution is s. 11 where it is provided that:

> The University may appoint such other officers or servants as may be prescribed by statute.

The power to enact statute concerning the method of appointment and conditions of service of the officers and teachers of the University except in relation to their discipline is provided in s. 25(c). In addition Acts may be made on the same subject matter by the Council of the University under s. 27(e) read with s. 28(1). The University Council is declared under clause 16 to be the executive body of the University and may exercise all the powers conferred on the University which include the power to appoint, promote and discipline officers, teachers and staff of the University. The said Council may also regulate the conditions of service which include scheme of service, salary scales, leave, discipline and the establishment of a pension scheme (see s. 29(1)). There is of course the usual saving clause to prevent inconsistencies enacted under any Statute, Act or regulation with each other on the Constitution (see s. 31). One final clause which is of some significance is s. 45(3) which provides *inter alia* that:

> Every person employed by the University shall hold office on such terms and conditions as may be prescribed by the Council and the terms and conditions to be so prescribed shall be deemed to include a provision -
>
> (a) (not applicable to the plaintiff's case)
> (b) in relation to all other terms and conditions of service that his employment is subject to the provisions of this Constitution and to the provisions of all Statutes, Act and Regulations **in force on the date of the commencement of his employment.**
>
> (Emphasis supplied).

However sub-clause (4) of clause 45 provides what appears to be an exception to clause 45 (b) when it states:

> Nothing in this section shall prevent the Council **from entering into a special contractual arrangement with a person to be so employed by the University** if it is in the opinion of the Council expedient so to do. (Emphasis supplied).

After all has been said and done, the legislature of the Constitution laid stress on the fact that notwithstanding any thing expressed in the Constitution every person employed by the University shall hold office subject to the provisions of Act 30 of 1971 and any subsidiary legislation made thereunder including rules made under s. 16C thereof, and terms and conditions of their employment or appointment shall be deemed to include a provision to this effect. It is important to take note that the Constitution of the defendant University is substantially if not wholly a reproduction of the university constitution provided under s. 8 of the Act 30 of 1971 a specimen of which appears in the Schedule of the said Act.

In 1964 the Council of the University enacted the UMMSS Regulations which also incorporated the Sick Leave Rules. I have already dealt with the provisions of the said Regulations and rules and nothing much need to be said about these Regulations and Rules except perhaps to mention that these Regulations and Rules are still in force up to today as they have not been revoked or amended.

The Service Circular No. UM01 of 1975 passed by the defendant University, however, has a significant effect in my determination of whether the master and servant relationship is applicable to the plaintiff's case. In this connection it is to be noted that firstly it is mentioned in the preamble that the Service Circular shall not apply *inter alia* to Contract Officers which is explained in the footnote to mean officers who are appointed on specific terms and conditions of service for a specific period which include the payment of gratuity. Instead the Contract Officers shall continue to be governed by their existing terms and conditions of service. Now in the letter of offer dated 28 April 1964 it was stated *inter alia* that:

> (9) This contract of employment shall terminate when you reach the age of 55 years;
> (10) The contract of employment hereby created shall subject to clause 9 hereof enure for an indefinite period after the contract referred in clause 5 of this agreement but subject nevertheless to the right of the University to terminate forthwith your employment for any act of dishonesty or for inefficiency proved against you to the satisfaction of the University.

I think the word "enure" should read "endure" as I have not come across such a word nor could I find it in the dictionaries. Be that as it may, paragraph (9) and (10) of the terms and conditions of offer of the employment strongly suggest that the plaintiff's case is not a straightforward case of master and servant. As a telephone operator employed by the University, the plaintiff has a status supported by a statutory provision namely s. 45(3)(b) read with paragraphs (9) and (10) of the terms and conditions set out in the said letter of offer. To reinforce this proposition paragraph 144 of Service Circular UM01 of 1975 provides for the classification of two categories of employees who convert to the new salaries namely:

(a) Permanent and Pensionable and
(b) Temporary and Non-pensionable.

Then again paragraph 145 thereof says:

> Subject to paragraph 146 below, all employees who are permanent shall be pensionable.

Paragraph 146 referred to above speaks of the condition of employment of employees in the pensionable establishment and subparagraph (iv) thereof contains the following term:

> Employees who had previously acquired pensionable status and who convert to the New Salaries shall be deemed to have been emplaced in the pensionable establishment.

It may be argued that Service Circular UM01 of 1975 has no statutory force not being a written law. The short answer to such a suggestion is that by the said Circular the defendant University has made an offer to the plaintiff regarding the new terms and conditions of service which the latter had unequivocably accepted. The defendant University is therefore contractually bound to comply with their obligations arising from the new terms and conditions as set out in that circular. The obligations must include their acceptance of the statutory status of the plaintiff as their employee.

For the above reasons I have no hesitation in holding that the plaintiff has acquired a status protected by statute and the ordinary master

and servant rule is of no application to her case. In support of my finding I would refer to the case of *Fadzil bin Mohamed Noor v. UTM* [1981] 2 MLJ 196. There the appellant claimed that the dismissal of his service with University Teknologi Malaysia was wrongful on the ground that the Vice-Chancellor who dismissed the appellant had no power to do so. Hence he sought a declaration that the purported dismissal was *ultra vires*, illegal and void. In allowing the appeal the Federal Court said at p. 198:

> Clearly this is not a straight-forward case of master and servant. The appellant as an Assistant Lecturer employed by the University, has a status supported by statute and is entitled to the protection of hearing before the appropriate disciplinary authority, including the right of appeal to the University Council from the decision of that authority. If that right is violated, as happened here, then the court may allow declaratory relief, enabling him to retain his employment, and continued eligibility to be paid his salary and all emoluments from the date of the purported dismissal. The point is, here, the appellant's employment had never been terminated. It would be open to the University at any time hereafter to dismiss him if it so chooses to do and does so in a lawful manner. Until it chooses to do that the appellant's contract of employment will continue. We find it hard to believe that in a field of employment such as the present, the legislature can really be said to have intended that the appellant is *ipso facto* to be deprived of his employment without any regard for vested right.

In the present case the termination of the plaintiff's service on medical grounds has been found by me to be wrongful - it is null and *void ab initio.* In law the plaintiff's employment had never been terminated and the plaintiff's contract of employment continues to be operative until the defendant University chooses to terminate it in a lawful manner.

For the above reasons I will grant the declaration asked for in prayer (i). There is no practical use to grant prayer (ii) since the plaintiff had already reached retiring age in June 1992. Incidental to my allowing the declaration under prayer (i) an order is hereby made to direct the defendant University to pay the plaintiff all sums due and receivable by the plaintiff between 10 November 1979 up to the date when she attained the compulsory retirement age. Her last drawn salary as at the date of the termination of service will be the figure upon which the calculation of such sums shall be made. I chose this figure as it would be pure speculation on my part to hold that the plaintiff should be entitled to any increase of her salary after the date of termination since such increase is subject to the efficient performance of duties which is a matter for the Council of the University to determine. The total sum payable will carry interest at the rate of 8% p.a. from date of judgment to date of realisation. Finally costs of the proceeding is to be paid by the defendant University.